Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OSCAR MARTINEZ MONCIVAIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT 0F CERTIORARI

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35 pp

QUESTIONS PRESENTED

QUESTION NUMBER ONE PRESENTING A CONFLICT AMONG THE CIRCUITS:

In a drug conspiracy case requiring the government to prove Petitioner's knowledge and intent did the Court of Appeals reduce the government's burden of proof, deny Petitioner due process and affirm his conviction on mere negligence when the appeals court tested the sufficiency of the evidence of Petitioner's guilty knowledge against a deliberate ignorance standard from a trial in which neither party presented evidence or requested an instruction on Petitioner's deliberate ignorance?

QUESTION NUMBER TWO PRESENTING A DEPARTURE FROM SETTLED LAW:

In reviewing the sufficiency of the evidence of Petitioner's guilty knowledge, may the Court of Appeals affirm his conviction on the basis of a theory which was neither presented by the government at trial nor contained in the district court's charge to the jury?

LIST OF PARTIES

Petitioner,

Oscar Martinez-Moncivais

Respondent,

United States

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NO. _____

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OSCAR MARTINEZ MONCIVAIS,
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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

This Petition is filed by OSCAR MARTINEZ-MONCIVAIS by his counsel seeking a review of the decision of the United States Court of Appeals for the Fifth Circuit for the following reasons.

OPINION BELOW

The opinion below is published at *United States v. Oscar Martinez-Moncivais*, 14 F.3d 1030 (5th Cir. 1994), and a copy of that opinion is attached to this Application as exhibit A.

STATUTORY PROVISION CONFERRING JURISDICTION TO REVIEW JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT BY CERTIORARI

28 U.S.C. §1254

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to the civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §2101(c)

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

THE CRIMINAL STATUTES

21 U.S.C. § 841(a)(1)

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 846

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment Five

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

DATE OF JUDGMENT

The date of the original opinion of the United States Court of Appeals for the Fifth Circuit was February 11, 1994.

DATE OF REHEARING

The Petitioner's Motion for Rehearing was overruled by the United States Court of Appeals for the Fifth Circuit on April 9, 1994.

COURSE OF PROCEEDINGS

A. PROCEDURAL HISTORY

In May 1990, a grand jury sitting in the San Antonio Division of the Western District of Texas returned a 24-count indictment charging 36 individuals with participating in a far-reaching criminal enterprise involving the importation, transportation, and distribution of substantial amounts of illegal drugs. The Petitioner was specifically charged in Count Three of the indictment with conspiracy to possess with intent to distribute marijuana and cocaine, and in Count Four with conspiracy to import with intent to distribute marijuana and cocaine, all in violation of 21 U.S.C. §§ 841(a)(1) and 846.

After a trial involving Petitioner and two other defendants, the jury found Martinez not guilty on Count Four, but guilty on Count Three for conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana, and in excess of 5 kilograms of cocaine. On May 11, 1992, the district court judge sentenced Petitioner under the sentencing guidelines to imprisonment for 262 months, supervised release for five years, and fined him $10,000 exclusive of the special assessment.

Petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit alleging, among other things, that the evidence presented by the government was insufficient to prove he had the requisite knowledge of the

presence of the narcotics which was hidden in sealed compartments of his 18 wheeler truck trailer and buried in lime which was transported within a large "hopper trailer" towed behind his truck. Acknowledging the need for additional proof from the government other than Petitioner's mere presence so as to demonstrate his subjective knowledge of the presence of the narcotics in a case where the narcotics are contained in hidden and sealed compartments, the Court of Appeals found that Petitioner's knowledge could be inferred from circumstances demonstrating his deliberate ignorance of the presence of the narcotics:

> The evidence presented was sufficient to show that Martinez had a subjective awareness of the high probability that he was involved in illegal conduct.

United States v. Martinez, 14 F.3d 1030, 1035 (5th Cir. 1994) Petitioner's motion for rehearing was denied by the Court of Appeals without further opinion.

B. STATEMENT OF FACTUAL HISTORY RELEVANT TO THIS PETITION

Petitioner was arrested in his home in a rural area outside of Laredo, Texas during the execution of a search warrant by Drug Enforcement Administration agents. No narcotics or paraphernalia were found in his home. Contemporaneously with that search, another warrant was executed at a residence in Laredo, Texas which was owned by Petitioner's wife. A small amount of drugs, some scales and wrapping paper, and some notes containing the names of other members of the conspiracy were located there. Although Petitioner and his wife had lived at the Laredo residence in the past and Petitioner's driver's license still showed that address, the neighbors and Petitioner's wife

testified that Petitioner and his family had not lived there for several years and that a hispanic couple had been living there and paying rent to Petitioner's wife.

Petitioner was never found to have been in possession of any narcotics. However, some of the trailers which he hauled for the trucking company which employed him contained sealed and hidden compartments which were later discovered by the agents of the Drug Enforcement Administration. No testimony from the government's witnesses showed that Petitioner had loaded or unloaded drugs into the compartments, and no testimony showed that Petitioner had been present during the loading and unloading of the drugs. He was one of several truck drivers who delivered and picked up trailers at the location.

The circumstantial evidence demonstrated that the tile business warehouse where Petitioner delivered and picked up trailers never conducted any legitimate commerce. His name appeared in hand-written notes found in the home of the leader of the narcotics organization, and the notes made reference to a trip to California made by Petitioner ("Oscar") in which a trailer with sealed compartments containing narcotics was delivered. Petitioner was never seen with the trailer, but he was present outside of a restaurant where several members of the conspiracy were discussing how to get the trailer to California. It was determined after the meeting that Petitioner would drive the trailer, but no testimony showed that Petitioner was notified that it contained narcotics. Petitioner was given a traffic ticket in California at about this time. Previously, Petitioner had been seen in the presence of the leader of the narcotics organization who had assisted Petitioner in purchasing a new truck for his personal use.

C. BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The jurisdiction of the district court as alleged in the indictment was found in 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846.

REASONS FOR GRANTING THE WRIT

A. REASON NUMBER ONE PRESENTING A CONFLICT AMONG THE CIRCUITS

S.Ct. Rule 10.1(a) reads in relevant part that certiorari may be granted:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter...

In this case the United States Court of Appeals for the Fifth Circuit affirmed the sufficiency of the evidence of Petitioner's knowledge of a conspiracy without reference to the reduction of the government's burden of proof. Affirmance under a deliberate ignorance standard, except in cases where the appellant's conscious contrivance to avoid knowledge has been demonstrated factually, reduces the government's burden of proof to a level of showing mere negligence rather than criminal intent. Several courts have held that this is a denial of due process. *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992); *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991).

Nevertheless, the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's case under the uncharged theory of deliberate ignorance, noting its own precedent which allows affirmance under a deliberate

ignorance standard regardless of whether the government has proven facts demonstrating that an appellant has consciously avoided knowledge. That is, there is a requirement in the Fifth Circuit that the government demonstrate only a *high probability* of an appellant's subjective awareness that some illegal activity is afoot. *United States v. Martinez*, 14 F.3d 1030, 1035 (5th Cir. 1994) citing *United States v. Stouffer*, 986 F.2d 916, 925 (5th Cir. 1993); and see *United States v. Cartwright*, 6 Fed.3d 294, 301 (5th Cir. 1993):

> Where there is no evidence of conscious ignorance, the jury will not attribute negligence to the defendant. The instruction [on deliberate ignorance] is "surplussage."

The Fifth Circuit's opinion in Petitioner's case has created a division among the circuits concerning whether affirmance under a deliberate ignorance standard creates an unconstitutional risk that an individual may be convicted for mere negligence. *United States v. Stone*, 9 F.3d 934, 939-940 (11th Cir. 1993) [noting the division among the circuits and siding with the Fifth Circuit]

B. REASON NUMBER TWO PRESENTING A DEPARTURE FROM ESTABLISHED LAW

S.Ct. Rule 10.1(a) reads in relevant part that certiorari may be granted:

> When a United States court of appeals...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision.

It is well settled that a criminal conviction cannot be affirmed on appeal on a theory not presented to the jury. *Dunn v. United States*, 442 U.S. 100, 106-107, 99 S.Ct. 2190, 2194, 60 L.Ed.2d 743 (1979); *McCormick v. United States*, 500 U.S. 257, ___ 111 S.Ct. 1807, 1814-1815, n. 8, 114 L.Ed.2d 307 (1991) In this case, the Fifth Circuit relied on the "deliberate ignorance" theory of knowledge to affirm Petitioner's conviction, even though the jury was not instructed on this theory. Neither party produced evidence of Petitioner's conscious avoidance of knowledge of the presence of narcotics in the hidden and sealed compartments, and Petitioner did not testify at trial.

Petitioner demonstrated this fact to the Court of Appeals in a motion for rehearing, but the court affirmed without further opinion. Therefore, the Fifth Circuit found that the evidence was sufficient to show that there was a high probability of Petitioner's subjective awareness that some illegal activity was afoot. *United States v. Martinez*, 14 F.3d 1030, 1035 (5th Cir. 1994) This holding is an affirmance on the theory of deliberate ignorance, and it reduced the burden of proof of the government to showing merely that Petitioner was negligent.

In Petitioner's case, had the Fifth Circuit's holding been supported by an instruction to the jury on deliberate ignorance, it might be bolstered by precedent which exists in the Eleventh and Fifth Circuits. *United States v. Cartwright*, 6 Fed.3d 294, 301 (5th Cir. 1993); *United States v. Stone*, 9 F.3d 934, 939-940 (11th Cir. 1993). Nevertheless, there is a conflict among the circuits concerning the constitutionality of a charge on deliberate ignorance. Except in cases where the appellant's conscious contrivance to avoid knowledge has been demonstrated factually, a deliberate ignorance instruction reduces the government's burden of proof to a level of showing mere negligence rather than criminal intent. *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992); *United States*

v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991).

CONCLUSION

There was no justification in law or in fact for an affirmance of the sufficiency of the evidence to support Petitioner's conviction on a theory of deliberate ignorance. Therefore, the United States Court of Appeals affirmed his conviction on a theory of proof of mere negligence rather than proof actual knowledge required by the statute, reducing the government's burden and denying Petitioner due process. The holding is in conflict with the law of the Eighth, Ninth and Tenth Circuits.

Neither a negligence theory nor a theory of deliberate ignorance was presented to the jury by the indictment, the summation to the jury or the jury instructions. Therefore, the United States Court of Appeals affirmed Petitioner's conviction upon a theory not presented to the jury. This was also a denial of due process.

For these reasons Petitioner prays that this Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
FEB 11 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

92-5593

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

OSCAR MARTINEZ-MONCIVAIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before GARWOOD and BARKSDALE, Circuit Judges, and SHAW* Chief Judge.

SHAW, Chief Judge:

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*Chief Judge of the Western District of Louisiana, sitting by designation.

OPINION

In May 1990, a grand jury sitting in the San Antonio Division of the Western District of Texas returned a 24-count indictment charging 36 individuals with participating in a far-reaching criminal enterprise involving the importation, transportation, and distribution of substantial amounts of illegal drugs. The appellant, Oscar Martinez-Moncivais ("Martinez"), was specifically charged in Court Three of the indictment with conspiracy to possess with intent to distribute marijuana and cocaine, and in Count Four with conspiracy to import with intent to distribute marijuana and cocaine, all in violation of 21 U.S.C. §§ 846 and 841(a)(1). The conspiracy began in 1983 and continued until the date of the superseding indictment in May of 1990. After a trial involving Martinez and two other defendants, the jury found Martinez not guilty on Count Four, but guilty on Count Three for conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana, and in excess of 5 kilograms of cocaine. On May 11, 1992, the district court judge sentenced Martinez under the sentencing guidelines to imprisonment for 262 months, supervised release for five years, and fined him $10,000 exclusive of the special assessment.

I. FACTS

Oscar Martinez was charged with transporting large amounts of marijuana and cocaine for an illegal narcotics enterprise known as the Salinas organization. The organization was headed by Alberto Salinas organization. The organization was headed by Alberto Salinas-Trevino (Salinas) and his brother Ramiro Salinas, and its interests stretched from Mexico into the United States.

The evidence against Martinez at trial came primarily from Government witness, Francisco De Leon Ortiz (De Leon). De Leon worked as the personal driver for another of Alberto Salinas's brothers, Baldemar Salinas, and as a warehouse worker and truck driver for the Salinas organization. De Leon testified that he first met Martinez when Martinez drove a tanker truck full of lime to the Span Tile warehouse where De Leon was working. The Span Tile warehouse, according to the evidence at trial, was one of the centers for the Salinas organization's importation and distribution of illegal narcotics. De Leon testified that customarily, workers at that warehouse would extract the lime from such incoming tanker trucks and then unload thirty-five gallon steel barrels that had been buried in the lime inside hidden compartments. The marijuana and cocaine were contained in these barrels.

According to the evidence, from 1986 to the summer of 1987, Martinez transported drug-filled barrels inside hidden compartments in lime-filled trucks to the warehouse and picked up the barrels in trailers and transported them elsewhere. De Leon and others would unload the barrels from the hidden compartments of the tanker trucks driven by Martinez. Martinez was not directly involved in either the loading or unloading of the barrels into the secret compartments. He was, however, one of only four or five drivers making deliveries to and from the Span Tile warehouse during the period of time that Martinez worked as a truck driver for the Salinas organization. There was additional testimony that Martinez worked directly for Alberto Salinas.

There was further testimony that no one at the warehouse ever did any business concerning tiles. The tanker trucks that arrived contained drug-filled barrels buried

in lime, and the trucks that left the warehouse carried drugs. No tiles were manufactured, stored or sold at the Span Tile warehouse.

Martinez's defense to the charges was that although he did drive some of the trucks loaded with marijuana and cocaine, he had no knowledge that the trucks were carrying drugs because he was never present when the trucks were being loaded and unloaded, and because he always kept to himself, never talking to anyone at the warehouse about the business. The jury did not believe this defense and found sufficient evidence to convict Martinez on one count of conspiracy to distribute narcotics.

II. DISCUSSION

Martinez appeals the decision of the jury in this case, as well as certain rulings made by the district court judge, and the sentence that the judge imposed. We will address each argument that Martinez raises on appeal.

A. Sufficiency of the Evidence

Martinez first contends that the weight of the evidence does not support the jury's verdict finding him guilty of conspiracy. As a reviewing court, we must examine the evidence in the light most favorable to the verdict. *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989). We will affirm a verdict "if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Id.*, *quoting U.S. v. Palella*, 846 F.2d 977, 981 (5th Cir.), *cert. denied*, 488 U.S. 863 (1988). In this particular case, we will affirm the jury's determination if there was sufficient evidence for us to conclude that it was not irrational for the jury to have found that the Government proved the elements of the crime charged beyond a reasonable doubt.

To convict a defendant of conspiracy to distribute narcotics in violation of 21 U.S.C. §§ 841(a)(1) and 846, the Government must prove three elements of the crime beyond a reasonable doubt: 1) that there was an agreement between two or more persons to violate the narcotics laws; 2) that the accused knew of the agreement or conspiracy; and 3) that he voluntarily joined in the conspiracy. *United States v. Singer*, 970 F.2d 1414, 1418 (5th Cir. 1992); *United States v. Rodriguez-Mireles*, 896 F.2d 890, 892 (5th Cir. 1990). The required elements of a narcotics conspiracy need not be proved by direct evidence but may instead be established solely by circumstantial evidence. *Ayala*, 887 F.2d at 67; *United States v. Wright*, 797 F.2d 245, 253 (5th Cir. 1986).

Martinez contends that, based on the circumstantial evidence that the Government presented at trial, no rational jury could have reasonably inferred either his knowledge of the existence of drugs in the trucks he was driving or his voluntary participation in the conspiracy. Absent adequate proof establishing those two elements of the crime, Martinez correctly argues, the evidence would not support the jury's verdict finding Martinez guilty of violating Sections 841(a)(1) and 846 of Title 21.

Concerning the second element of the crime, appellant's knowledge of the narcotics conspiracy, Martinez argues that as a truck driver for the Salinas organization he had been merely present at the center of the Salinas drug import/export business. He contends that because the drugs were shipped in barrels that were placed into hidden compartments inside the truck's trailer and then covered with lime, he did not know that he was transporting drugs -- that he thought he was simply hauling lime. HE argues that because there was no evidence that he ever witnessed the drugs being loaded or unloaded from his truck at the Span Tile warehouse he was therefore unaware that he was

transporting drugs. In other words, Martinez maintains that his mere proximity to criminal activity is insufficient evidence of his knowledge of, or his participation in, the conspiracy. Martinez is only partially correct. In *United States v. Maltos*, we said:

> mere presence at the crime scene or close association with conspirators, *standing alone*, will not support an inference of participation in the conspiracy. 985 F.2d 743, 746 (5th Cir. 1992) (emphasis added).

In this case, Martinez's presence at the center of the criminal activity does not stand alone as the only evidence of his knowing participation in this conspiracy. There are several other facts that when added to Martinez's presence provide amply evidence to support the jury's verdict finding him guilty of violating 21 U.S.C. §§ 841(a)(1) and 846.

First, Martinez was "merely present" at the center of the conspiracy's criminal activity at the warehouse on more than an isolated or random occasion. He was "merely present" at that warehouse making deliveries as often as once or twice a week for the better part of a year. The cases Martinez cites in support of his "mere presence" argument involve defendants whose presence at the scene of criminal activity occurred on isolated or random occasions. *See United States v. Skillern*, 947 F.2d 1268, 1274 (5th Cir. 1991)' *United States v. Blessing*, 727 F.2d 353 (5th Cir. 1984). The implicit rationale behind the "mere presence" argument is the theory that there may often be innocent parties who on occasion unwittingly associate with guilty parties at the scene of their criminal activity. *See United States v. Fitzharris*, 633 F.2d 416, 423 (5th Cir. 1980). So we have said that it is irrational for a trier of fact to infer from a person's *mere random presence alone* that the person

was a knowing participant in the conspiracy. *See United States v. Tolliver*, 780 F.2d 1177, 1182 (5th Cir 1986). In this case, however, Martinez was one of only a handful of drivers that the Salinas organization used to make deliveries to and from the Span Tile warehouse. The evidence showed that these deliveries and pickups were made by the drivers on the average of two to three times per week. This is not the type of "mere presence" with which the courts in *Blessing* and *Skillern* were concerned.

Second, Martinez was entrusted with transporting millions of dollars worth of drugs. Other circuits have held that "it is reasonable for a jury to conclude that in the course of transporting millions of dollars of readily marketable marijuana through channels that should lack the protections of organized society, a prudent smuggler is not likely to suffer the presence of unaffiliated bystanders." *See United States v. Cruz-Valdez*, 773 F.2d 1541, 1547 (11th Cir. 1985), *cert. denied sub nom. Ariza-Fuentas*, 475 U.S. 1049, 106 S.Ct. 1272, 89 L.Ed. 2d 580 (1986). Put another way, reasonable jurors could conclude that Salinas would not have entrusted millions of dollars in each truckload of drugs to an unknowing. innocent driver. The jury could reasonably conclude that Salinas would have considered the risk to be far too great that such a driver, if he did discover the hidden drugs on one of his many trips, would inform the authorities, or perhaps try to sell the drugs himself, depriving Salinas of the millions of dollars in profits.

Third, the evidence in this case shows that there was never a legitimate business operating at the Span Tile warehouse where Martinez made his frequent pickups and deliveries. The evidence shows that no one working at the Span Tile warehouse conducted any business concerning tiles. Moreover, the warehouse facility was not easily assessed. There was a guarded gate that had to be opened

before any of the trucks could enter the facility -- another sign that the jury could infer was inconsistent with the operation of a legitimate business.

Another fact that was inconsistent with Martinez's defense that he was merely an unknowing driver was that the head of the Salinas organization, Alberto Salinas, purchased a new passenger truck for Martinez as a gift. Although Martinez maintained that the truck was not a gift, and that he would have paid Salinas back for it, a jury could reasonably infer that in a normal business relationship, an hourly-wage truck driver would not ordinarily receive such an extravagant gift or bonus from his employer.

Finally, there was also testimony that Martinez had agreed on the spur of the moment to drive a truckload of "lime" from Texas to California immediately. He agreed to do so despite the fact that Salinas's decision and request was made outside a McDonald's restaurant in response to and emergency situation,[1] and even though the trailer Martinez was to haul did not have a license plate. With regard to this particular trip, Mario Salinas's personal notes, which were his records of where his trucks were going and which were introduced at trial, contained the notation "one, Oscar" with the date of the trip to California, "7/25/87," and a reference to "polvo," which means "powder." On this same trip, Martinez was ticketed by the California Highway Patrol for failing to keep a logbook on that trip, as required by law,

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[1] According to the record, Salinas had received a tip that federal agents may raid the Span Tile warehouse. Two of his people immediately loaded the drugs from the warehouse into a trailer. The next day Salinas and others met at a McDonald's restaurant, while Martinez waited outside. After the meeting they asked Martinez to transport the untagged trailer to California immediately. There was no evidence at trial of any particularly dangerous shortage of lime in California that would have necessitated such an immediate shipment.

and as Martinez regularly did on his trips, according to the testimony of his wife.

In summarizing, then, the issue of the sufficiency of the evidence in this case, mere presence at the scene of criminal activity is insufficient evidence to support a conviction for participation in a narcotics conspiracy when such evidence stands alone. When, as here, the defendant's presence is more than isolated or random and is considered along with the other evidence presented, we cannot say that the jury was irrational in finding Martinez guilty of knowing, voluntary participation in the narcotics conspiracy alleged in this indictment. *See United States v. Rodriguez-Mireles*, 896 F.2d 890, 893 (5th Cir. 1990). The combined effect of all of the circumstantial evidence allowed the jury to infer that Martinez had not been consistently duped into unwittingly transporting illegal drugs. The evidence presented was sufficient to show that Martinez had a subjective awareness of the high probability that he was involved in illegal conduct. *See United States v. Stouffer*, 986 F.2d 916, 925 (5th Cir. 1993). The jury had ample evidence to conclude that Martinez was a knowing and voluntary participant in the Salinas organization's drug distribution business.

B. Propriety of the Jury Trial Proceedings

Martinez also raises several issues on appeal concerning the district court judge's handling of particular aspects of the trial proceeding. Specifically, Martinez claims that jury misconduct occurred during deliberations that necessitated the judge's granting his motion for a new trial; that mid-trial publicity concerning the voluntary absence of a co-defendant prejudiced his defense and required a voir dire of jurors; and that the judge improperly answered a question from the jury by commenting on the evidence.

Martinez contention that there was jury misconduct in this case is wholly without merit. We review the trial court's decisions on this issue under the abuse of discretion standard. *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 2746, 97 L.Ed.2d 90 (1987); *United States v. Khoury*, 539 F.2d 441, 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

In this case, one of the jurors stated in a post-trial affidavit that two other jurors suggested that if the defendant had been innocent he would have taken the stand in his own defense.[2] Outside of the narrow exception that arises when there is evidence of outside influences on a jury, a court should adhere to the common-law rule against admitting juror testimony to impeach a verdict. *See id.*, citing *McDonald v. Pless*, 238 U.S. 264, 267 (1915); *Hyde v. United States*, 225 U.S. 347, 384 (1912). In 1915, the Supreme Court stated the rationale behind this rule:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding . . . . The result would be to make what was intended to be a private

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[2] Other circuits have held testimony or affidavits of jurors to be incompetent to show a jury's misinterpretation of instructions. *See Farmers Coop. Elev. Ass'n. v. Strand*, 382 F.2d 224, 230 (8th Cir. 1969). In *Tanner v. United States*, the Supreme Court noted that the Senate specifically rejected a version of Federal Rule of Civil Procedure 606(b) that would have permitted the impeachment of verdicts by inquiry into what happened in terms of conduct in the jury room. 483 U S. at 123 *citing* S. Rep. No. 93-1277, p. 13 (1974).

> deliberation, the constant subject of public investigation -- to the destruction of all frankness and freedom of discussion and conference. *McDonald v. Pless*, 238 U.S. at 267.

Martinez correctly states that a trial court must hold an evidentiary hearing when a defendant shows that external influences [3] were brought to bear on the jury's deliberative process. In this case, however, the jury did not encounter improper external influences that would necessitate an evidentiary hearing. *See United States v. Duzac*, 622 F.2d 911, 913 (5th Cir.), *cert. denied*, 449 U.S. 1012 (1980). In the same affidavit, the affiant states that other jurors reminded the jury of the judge's instructions that they could not take into account Martinez's decision not to testify in his defense. The affiant went on to state that two jurors'

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[3] Martinez argues that "external influences" and "extraneous prejudicial information" are different concepts under Federal Rule of Civil Procedure 606(b). He suggests that external influences generally include contacts between lawyers or parties to the case and jurors, threats on jurors, and so forth. Extraneous prejudicial information, he argues, is a broader concept embracing "more than extra record material brought to the jurors" attention by outside sources or through inadvertence." The cases he cites in support involve situations in which the jurors bring outside information into deliberations themselves. *See, e.g., In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982); *United States v. Castello*, 526 F.Supp. 847 (W.D.Tex. 1981). These cases usually involve tests or experiments that jurors had conducted themselves to help them evaluate the evidence, juror visits to the scene of the alleged accident, and so on. Even if we were to agree that the drafters of 606)b_ intended external influences and extraneous prejudicial information to be separate concepts, a finding which we do not make, the alleged juror misconduct in this case does not rise to the level of extraneous prejudicial information as defined by the appellant. There is no evidence that the jurors in question did anything outside of the courtroom, such as talking to a lawyer or doing legal research, that would have led them to make the statement concerning the appellant's not testifying in his own defense.

statement did not weigh heavily in the jury's deliberative process and were not a basis for the jury's decision to find Martinez guilty. Based on these facts, it is clear that the judge did not abuse his discretion in determining that the information contained in the affidavit was not an adequate basis on which to grant Martinez's motion for a new trial based on a claim of jury misconduct.

Similarly, Martinez argues that the district judge erred in denying Martinez's request for individual voir dire of the jurors regarding the effects upon the jury of mid-trial publicity concerning a co-defendant's voluntarily absenting himself. Voir dire of the jurors is necessary in such circumstances only if serious questions of possible prejudice could arise because of the trial publicity. *See United States v. Aragon*, 962 F.2d 439, 444 (5th Cir. 1992). The district court must perform a two-step inquiry to determine whether such serious questions exist. *See United States v. Herring*, 568 F.2d 1099, 1104-05 (5th Cir. 1978). First, the court must look at the nature of the media coverage, and determine whether it raises serious questions of possible prejudice. *Id.* Factors influencing the first inquiry include the timing of the media coverage of the trial proceedings, the nature of the material disseminated, and its potential effect on legal defenses. *Aragon*, 962 F.2d at 443. Second, the court must weigh the likelihood that the damaging material has in fact reached the jury. *Id.* Factors influencing the second inquiry include the significance of the media coverage and the nature, number, and regularity of warnings from the judge against viewing the coverage. *Id.*

At the outset of the trial, the judge admonished the members of the jury to avoid reading or listening to any media coverage that they may encounter concerning the trial. After the co-defendant disappeared, the judge granted Martinez a four-day delay to give his attorney an opportunity

to find him. When that proved unsuccessful, the judge them admonished the jury not to consider the co-defendant's absence as evidence of the guilt or innocence of any other defendant. In this case, the news media had merely publicized an issue that the jurors had already been informed of by the judge himself -- that one of the defendants had absented himself. In other words, even if jurors defied the judge's instructions and read or heard media accounts of the co-defendant's disappearance, there was no evidence that they would have learned much more than what the judge explained to them when he told them about the co-defendant's "voluntary absence" and admonished them that it was to have no bearing on their view of the remaining defendants' guilt or innocence. Therefore, Martinez failed to establish the first element of the *Herring* test -- the potential for prejudice to his defense as a result of the publicity. Because the judge did not find that there was a potential for prejudice caused by the media publicity concerning the other defendant's absence, he was not required to address the second part of the inquiry in order to determine that there were no serious questions of possible prejudice that would require a voir dire of the jury.[4]

Martinez's final contention in this area of the trial procedure itself is that the trial court judge erred by improperly commenting on the evidence in its answer to a question from the jury. In that question, the jury asked:

> May we have information concerning Government's Exhibit 84-A, 84-C, the Rolodex card? Where was the card found?

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[4] In *United States v. Manzella*, we affirmed the defendant's conviction despite the trial court's failure to voir dire the jury on grounds that while the media account of the defendant's prior conviction was prejudicial, the chance of its actual influence over the jury's decision-making process was minute. 782 F.2d 533, 543 (5th Cir. 1986).

After consultation with both sides, the court responded, over defense counsel objection, and based on the Government's notes of Customs Agent, Raul Cardenas's, testimony:

> The testimony of November 14, 1991 of Raul Cardenas, U.S. Customs Agent, during his testimony 84-A and 84-C were found inside the van at the time of the arrest of Margarito Flores and John Kritzer ... on July 24, 1987.

Martinez claims that this response was an improper comment on the evidence because the judge told the jury where Cardenas found the exhibits and based his answer on the recordation of Cardenas's testimony as supplied by the Government.[5] By merely reciting one portion of the trial testimony, however, in response to a narrow, factual question from the jury, the court was not endorsing the testimony as correct or incorrect, but was merely recounting what the witness had said about where the cards were found. The jury could decide whether or not to believe that witness's testimony, just as they could evaluate the credibility of testimony from all of the witnesses on both sides in the case. We cannot therefore say that the district court erred in its response to the question from the jury in this case.

C. Sentencing Guidelines Issues

Martinez also raises several issues concerning the sentence the district court imposed. Martinez first argues that the sentencing guidelines were not applicable to his case. He suggests that because his last overt act in furtherance of the conspiracy occurred in July of 1987, four months before

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[5] Nothing in the record or in appellant's briefs indicates that the government's notes regarding Cardenas's testimony were inaccurate or incorrect.

the sentencing guidelines became effective on November 1, 1987, the judge should not have applied the guidelines to this case. This contention is entirely without merit. The jury convicted Martinez for his participation in a conspiracy that, according to the superseding indictment charging Martinez, remained ongoing into 1990. Conspiracy is a continuing offense, and this court has affirmed application of the guidelines to a defendant who, while not participating in overt acts of the conspiracy after the guidelines took effect, failed to take affirmative actions to withdraw from a conspiracy that remained ongoing after the guidelines became effective. *See United States v. Puma*, 937 F.2d 151, 158 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1165 (1992). The United States Supreme Court defined such "affirmative acts" as those acts that are "inconsistent with the object of the conspiracy and [that are] communicated in a manner reasonably calculated to reach co-conspirators ...." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65, 98 S.Ct. 2864, 2887-88, 57 L.Ed.2d 854 (1978). Martinez took no such affirmative actions in this case, and thus remains responsible as a co-conspirator for the all of the acts charged to the conspiracy, which continued into 1990. There was therefore no retroactive application of the sentencing guidelines to Martinez in this case. The district court correctly looked to the sentencing guidelines in sentencing Martinez.

The appellant also claims that the district court erred in its sentence by miscalculating Martinez's criminal history category. The district court judge's calculation of a defendant's relevant criminal history category is a finding of fact that we review for clear error. *See U.S. v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir. 1989). A court's factual finding is not clearly erroneous if it is plausible in light of the record read as a whole. *United States v. Sanders*, 942 F.2d 894, 897 (5th Cir. 1991).

Martinez claims that the district court miscalculated his relevant criminal history category under U.S.S.G. § 4A1.2(a)(2), by counting two of his prior convictions as separate convictions rather than as "related cases" which under the guidelines would only be counted as a single prior conviction. United States Sentencing Commission, *Guidelines Manual*, § 4A1.2(a)(2) (Nov. 1993). Martinez contends that because the two cases were set on the sentencing docket for the same day, and were tried together with the involvement of the same judge, prosecutor, and defense attorney, that they are related cases that should only count as one prior conviction. In truth, however, the record indicates that there were two separate offenses. On February 28, 1977, Martinez was convicted of possession with intent to distribute marijuana and was sentenced to probation. In June of 1977, he was convicted for being a felon in possession of a firearm. Because of this subsequent conviction, Martinez's probation for the first offense had to be revoked. It was the revocation of Martinez's probation for the prior marijuana conviction that was scheduled for the same day that his sentence was imposed on the conviction for illegal possession of a firearm. In effect then, there were three prior sentences. Martinez was initially sentenced to probation for his original marijuana conviction. Several months later, after he was convicted on the subsequent firearms charge, he was sentenced both for the possession of a firearm, and for the violation of his probation on the marijuana conviction. The district court did not therefore err in counting these two offenses as separate convictions and calculating Martinez's criminal history as a category IV rather than a category III.

The appellant also contends that the lower court erred in calculating Martinez's relevant conduct under the sentencing guidelines by using an incorrect quantity of drugs as the figure on which to base its calculation. Appellant

argues that the court should have considered only the equivalent of 174,000 kilograms of marijuana in calculating his offense level. The district court has broad discretion in considering the reliability of the submitted information regarding the quantities of drugs involved. *United States v. Kinder*, 946 F.2d 362, 366 (5th Cir. 1991). We will overrule the factual findings of the district court on sentencing issues only if such findings are clearly erroneous. *Id.* In this case, we need not address whether the district court improperly used any amounts in excess of 174,000 kilograms. According to the 1987 version of the Sentencing Guidelines,[6] under which Martinez was sentenced, anything over 10,000 kilograms of marijuana would result in the highest offense level at the time. -- 36. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1 (May 1987). Since appellant does not dispute the amount of drugs the court used in its calculation up to 174,000 kilograms, the district court used the proper offense level in calculating Martinez's sentence.

Martinez's final contention in this appeal is that the district court erred in failing to adjust his offense level downward pursuant to U.S.S.G. §§ 3B1.1-3B1.4. The sentencing guidelines allow a sentencing judge to effect a downward adjustment for a defendant who plays a mitigating role in the offense for which he was convicted. U.S.S.G. § 3B1.2. As stated earlier, we review a district court's factual findings in preparation for sentencing under the clearly erroneous standard. *Mejia-Orosco*, 867 F.2d at 221. In this case, Martinez argued that he deserved a downward adjustment in his sentence because, as defined in U.S.S.G.

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[6] The 1987 version of the Sentencing Guidelines are actually more generous to Martinez than the current Guidelines, which would have placed him at an offense level of 40 for any amount of drugs between 100,000 and 300,000 kilograms. U.S.S.G. § 2D1.1(c)(2)(1993).

§§ 3B1.2(a)(b), he was either a "minimal" participant or a "minor" participant in the conspiracy for which he was convicted of being involved. The Application Notes explain that a defendant's "lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant." U.S.S.G. § 3B1.2, Application Note 1. As an example of a defendant who may be described as a minor participant in a conspiracy for guidelines purposes, the Application Notes describe a person "who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." U.S.S.G. § 3B1.2, Application Note 2. Martinez contends that because he did not know what he was delivering, and was basically an innocent participant in this conspiracy, his role was either "minimal" or "minor." The jury, however, clearly found him guilty of participation in the conspiracy as charged in this case, which by definition entailed the jury's finding that Martinez had knowledge of, and voluntarily participated in, the ongoing transportation of entire truckloads of narcotics. The judge's determination that the facts of this case did not warrant a downward adjustment was therefore not a clearly erroneous finding.

III. CONCLUSION

Finding no error, we AFFIRM the district court on all issues raised on appeal.